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No. 84-1935

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, MARIAN JACKSON, REGINALD JAMES, EMMETT POMPEY, EFFIE L. SIMMONS, AND HELEN VANCE,
Petitioners,

VS.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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The court of appeals held that the Secretary of Labor had absolute, unreviewable discretion to refuse to spend any appropriated funds on a congressionally-established training program despite the fact that Congress in the pertinent appropriation had expressly required that program to be "carr[ied] into effect." The government contends that this result is proper, notwithstanding the appropriations language, on the theory that unless Congress has specified the precise dollar amount to be allocated to a particular statutory program, the Executive's funding allocation decisions are wholly insulated from judicial review. This contention ignores the "strong presumption of reviewability" under the Administrative Procedure Act, is inconsistent with numerous cases from this Court and the courts of appeals holding that judicial review *is* available to determine whether the Executive abused its discretion in failing to spend money appropriated by Congress, and is irreconcilable with the pertinent approprations language. Certiorari should be granted to restore to Congress its traditional control over the appropriations process and to ensure that statutory programs created by Congress may continue to be implemented without Congress having to immerse itself in the myriad of budgetary details surrounding each program it wishes to have "carr[ied] into effect."

1. The government first contends that this Court's recent decision in *Heckler v. Chaney*, ___ U.S. ___, 105 S.Ct. 1649 (1985), which created a presumption of *un*reviewability for agency non-enforcement decisions, should be extended to require a presumption of unreviewability for agency funding decisions as well.[1] However, such an extension of the present law would be inconsistent with the *Heckler* decision[2] as well as with other decisions of this Court and numerous courts of appeals.[3] The

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[1] Government's Brief in Opposition ("Gov. Br."), at 8, 11.

[2] *See* 105 S.Ct., at 1655, 1659.

[3] While the government argues that the cases cited by petitioners to support the presumption of reviewability "are inapposite [because] they did not concern the APA exception to judicial review for decisions 'committed to agency discretion by law' (5 U.S.C. § 701(a)(2))," this argument is simply incorrect. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("the Administrative Procedure Act embodies the basic presumption of judicial review . . . so long as no statute

government's contention therefore supports *granting* the Petition for Certiorari, rather than denying it, because so significant a change in the law of judicial review, particularly in the sensitive area of congressional appropriations, should not be permitted without this Court's plenary consideration.[4]

Somewhat inconsistently, the government also suggests that the court of appeals' analysis "is entirely harmonious with an analysis employing a presumption of reviewability." Gov. Br., at 11. This argument is presumably made to avoid conceding that the court of appeals' decision creates a conflict among the circuits and with decisions of this Court with respect to the presumption issue. But the government's argument is belied by the court of appeals' refusal to adopt a construction of the appropriations language that the court itself acknowledged "could indicate" Congress' understanding that funding for Trade Act training had been required.

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precludes such relief *or the action is not one committed to agency discretion"*) (emphasis added); *Hondros v. Civil Service Comm'n,* 720 F.2d 278, 291-92 (3d Cir. 1983); *Hartigan v. Federal Home Loan Bank Bd.,* 746 F.2d 1300, 1305 (7th Cir. 1984); *see also Train v. City of New York,* 420 U.S. 35 (1975).

[4] The change in the current law of judicial review advocated by the government is not warranted. When Congress appropriates funds and indicates to the agency that a particular program should be implemented, this congressional directive must be binding on the agency for Congress effectively to be able to perform its constitutional function. Agency funding decisions made pursuant to such appropriations are significantly different from agency non-enforcement decisions, for as this Court noted in *Heckler v. Chaney,*

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Heckler v. Chaney, supra, 105 S.Ct., at 1656.

Gov. Br., at 10, *quoting* Pet.App. A12.[5] If the ordinary strong presumption of reviewability had been applied to the "carry into effect" language of the pertinent appropriations, there can be little doubt that the court of appeals would have agreed with the district court that the Secretary's refusal to provide funding was judicially reviewable.

2. The government attempts to avoid conceding the existence of a circuit conflict with respect to the "impoundment cases" cited by petitioners[6] by stating that in each of those cases, the agencies had "refus[ed] to obligate funds in the face of specific congressional directives concerning the allocation or expenditure of funds, [but here] there has been no refusal to obligate funds." Gov. Br., at 12. That distinction is utterly spurious.

First, there *has* been a "refusal to obligate" in this case no less than in those other impoundment cases. The undisputed facts demonstrate that the Secretary refused to obligate *any* funds to the Trade Act training program from the $3.7 billion ETA appropriation in FY 1982. Moreover, the undisputed facts further demonstrate that of the $89 million in unspent monies in the ETA account at the end of FY 1982, *approximately $8.6 million had never been obligated by the Secretary to any program, Trade Act or otherwise.*[7] This case is therefore indistinguishable from the

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[5] It is further belied by the fact that the two D.C. Circuit judges who sat on the panel below have previously stated in express terms that *no* presumption of reviewability is appropriate under the APA. *See* Petition for Certiorari ("Cert. Pet."), at 11, n.9.

[6] *E.g., Train v. City of New York,* 420 U.S. 35 (1975); *State Hwy. Comm. v. Volpe,* 479 F.2d 1099 (8th Cir. 1973); *Sioux Valley Empire Electric Assoc. v. Butz,* 504 F.2d 168 (8th Cir. 1974); *City of Los Angeles v. Adams,* 556 F.2d 40 (D.C. Cir. 1977); *Comm. of Pennsylvania v. Lynn,* 501 F.2d 848 (D.C. Cir. 1974).

[7] The government admitted to the district court that $8.6 million from the ETA account had *never* been obligated to *any* program by the Secretary in FY 1982:

> We are also filing a new declaration of Sandra T. King updating Attachment 1 to her November declaration to provide end of year data for FY 1982 for the entire Employment and Training Account of the Labor Department [*see* Jt. App., at 106]. This is the account from which plaintiffs believe additional funds should have been drawn for Trade Act training. . . . [This declaration shows that] of

impoundment cases cited by petitioners, and under the court of appeals' own reading of those cases, judicial review should have been available.[8]

Second, the "impoundment" cases cannot validly be distinguished on the ground that they involved "specific congressional directives" to spend, for the directive to spend is no less specific in this case than in the cases cited by petitioners.[9] Nor is it a distinguishing factor that the Trade Act is not an individual "entitlement" program in that the Secretary "may" rather than

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> the $89 million [available] at the end of the year, some $4 million was money specifically appropriated for Job Corps training for FY 1982 and FY 1983, and some $77 million was prior year (1981) monies previously obligated for grants and contracts associated with the Comprehensive Employment and Training Act ("CETA") Public Service Employment Program which were closed out in FY 1982. These funds were deobligated and returned to the Government as public service employment grants and contracts were closed out. *See id. Only $8.6 million of funds in the entire Account were never federally obligated during the fiscal year* . . . .

Def. Mem. in Opp. to Pl. Cross-Motion for Summary Judgment, at 17 (emphasis added). Petitioners relied on this admission in their Reply Memorandum re Summary Judgment, at 26, n.23 (Defendant concedes that "$8.6 million of funds in the [ETA] account were never federally obligated at the end of the fiscal year"), in their Opposition to Defendant's Motion for Reconsideration, Clarification and Stay, at 11, in their brief to the court of appeals, at 38, and in their brief in support of rehearing *en banc*, at 4, n.4. In light of this admission and the facts that underlie it, the government is plainly mistaken in its assertion that "petitioners did not allege, nor did the evidence show, that the Secretary 'impounded' funds by refusing or failing to obligate the sums available." Gov.Br., at 12, n.10.

[8] *See* Gov. Br., at 6, *quoting* Pet.App.A13 (acknowledging that in the present case the Secretary was under " 'a directive to obligate *all* of the $3.7 billion to employment and training programs' ").

[9] *See, e.g., Sioux Valley Empire Electric Assoc. v. Butz*, 504 F.2d 168, 174-75 (8th Cir. 1974) (rejecting argument that allocation of funds was not required because Rural Electrification Act "authorized and empowered" the expenditure of funds, but did not "direct" the expenditure of funds).

"must" approve training,[10] for *none* of the impoundment cases cited by petitioners were entitlement cases. Moreover, in most of those cases the courts specifically *rejected* arguments that, because the substantive provisions of the pertinent statutes were written in permissive rather than mandatory terms, the Executive's refusal to provide funding was unreviewable.[11] The lack of any statutory entitlement should not preclude judicial review in the present case any more than it did in the cited cases. *See, e.g., Sioux Valley Empire Electric Assoc. v. Butz, supra,* 504 F.2d, at 172-73 (there is " 'law to apply' " in construing the relevant funding provisions, and therefore the Administrator's decision is "not wholly 'committed to agency discretion by law' ").[12]

3. The express congressional directive "to carry into effect" the Trade Act program "and" four other training programs is plain on its face. Coupled with Congress' subsequent appropriation of "additional" funds for Trade Act training, that language was more than sufficient to permit judicial review of the Secretary's denial of Trade Act funding, particularly in light of the "strong presumption of reviewability" under the APA. The court

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[10] *See* Gov. Br., at 12; *see also id.*, at 9, 11. Once training is "approved" by the Secretary, however, the individual import-affected workers who have received such training approval become statutorily entitled to federal reimbursement of their training costs. *See* 19 U.S.C. § 2296(a).

[11] *See, e.g., Sioux Valley Empire Electric Assoc. v. Butz, supra,* 504 F.2d, at 176-78 (rejecting argument that Congress' deletion of mandatory language from the Act vested the Secretary with unreviewable discretion to refuse to implement rural electrification program); *State Hwy. Comm. v. Volpe,* 479 F.2d 1099, 1108-12 (8th Cir. 1973) (holding that although the Federal-Aid Highway Act vests the Secretary with discretion in approving State highway programs, he may not withhold approval for reasons not contemplated by the Act).

[12] The fact that a program is an entitlement program is relevant only to whether the Executive must provide funding to every eligible applicant for benefits. Under a non-entitlement program—which encompasses the vast majority of statutory programs—benefits need only be provided to the extent funds have been appropriated. Until the present case, *no* court has held that the Executive may refuse to spend appropriated funds to implement a statutory program simply because that program does not create an individual entitlement to benefits.

of appeals reached the opposite conclusion because it labelled the pertinent appropriation a "lump-sum appropriation" and concluded that the "ordinary understanding of lump-sum appropriations" is that they "leave[ ] it to the recipient agency . . . to distribute the funds among some or all of the permissible objects as it sees fit." Gov. Br., at 9, 10. But that conclusion completely ignores the plain language of the appropriations bill, notwithstanding the settled principle that one must always look first to the statutory language in discerning congressional intent. See *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[13] The court's conclusion also imposes an enormous, and unwarranted, burden on Congress with respect to future appropriations, requiring Congress henceforth either to

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[13] The government suggests that the legislative history underlying Congress' First and Third Continuing Budget Resolutions supports the Secretary's action in refusing to provide funds to the Trade Act training program. *See* Gov. Br., at 10. However, the question of whether the Secretary properly exercised his discretion in failing to "carry into effect" the program is a question on the merits, not of judicial reviewability. Reliance on this history therefore supports petitioners' contention that there is "law to apply" in this case.

In any event, the government's reliance on this legislative history is misplaced. Rather than demonstrating what the government and court of appeals curiously describe as "at least a congressional realization, if not a congressional intent, that nothing would be expended for Trade Act training" (Gov. Br., at 10, *quoting* Pet.App. A8), the legislative history cited by the government merely demonstrates that certain *supporters* of Trade Act training had unsuccessfully urged their colleagues to *earmark* a specific amount from the $3.7 billion appropriation for Trade Act training. *See* Cert. Pet., at 19-20, n.19. Moreover, the considerable legislative history to which the government and court of appeals *did not ever refer*—although cited in the Petition for Certiorari and relied upon by the district court (*see* Cert. Pet., at 14, n.11, 19-20, n.19; App., at 27-30)—fully supports petitioners' construction of the congressional intent. In any event, there is no need to consider *any* of the legislative history, because the congressional intent is sufficiently demonstrated by the language of the appropriations itself. *See LTV Aerospace Corp.*, 55 Comp. Gen. 307 (Oct. 1, 1975) (resort to legislative history is not appropriate where language of appropriation is plain on its face).

refrain from funding more than one statutory program in a single appropriation, or to earmark in each of its multiprogram appropriations an exact sum of money to be spent on each individual program that it wishes to be "carr[ied] into effect"—and thus to deprive the Exective of much of the administrative discretion it currently enjoys in allocating funds among statutory programs.

Neither the government nor the court of appeals ever explains *why* the multiprogram appropriation at issue in this case—or any of the similar multiprogram appropriations enacted by Congress in recent years (*see, e.g.,* Cert. Pet., at 12-13, n.10)—should be considered "lump-sum appropriations" as that term has generally been understood in the appropriations process.[14] Simply to apply the descriptive term "lump-sum appropriation" is no substitute for analyzing the appropriations language itself, which is the *only* permissible way to determine whether Congress imposed any requirements or limitations on Executive spending in a particular appropriation. As petitioners have shown, the plain words of the

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[14] As petitioners explained in their Petition for Certiorari, a "true" lump-sum appropriation makes funds available for one or more purposes or programs with no statutory indication as to whether, or how, those funds should be allocated. *See* Cert. Pet., at 17, n.15.

pertinent ETA appropriation require the Secretary to implement *each* of the training programs designed by Congress.[15]

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this Reply Brief, the Petition for Certiorari should be granted, and this case set for plenary review.

Respectfully submitted,

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[15] The government persists in asserting that petitioners are requesting the courts to determine the precise allocation of funds among competing social programs. Gov. Br., at 6, 11. That is not so. As the district court recognized, petitioners asked only that the courts determine whether the Secretary's refusal to provide any funding to the Trade Act training program from the $3.7 billion ETA appropriation was consistent with his statutory mandate "to carry into effect" that program. The precise amount of funds necessary to achieve that result is for the Secretary, not the courts, to decide, and petitioners have only asked that the courts review that decision for reasonableness and consistency with the congressional directive. *See* Cert. Pet., at 20-21.